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IN THE

Supreme Court of the United States

October Term, 1984

JOHN W. WATERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. "[W]hether an agreement to procure testimony about accomplished facts, which places a premium on testimony adverse to a defendant, creates a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause."

United States v. Waterman, 732 F.2d 1527, 1530, *rev'd by an equally divided court,* 732 F.2d 1533 (5th Cir. 1984).

2. Whether an accused is denied procedural due process when habeas corpus relief is denied by an equally divided court upon *en banc* consideration without including the vote of a judge who decided to grant relief upon panel consideration.

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No.

JOHN W. WATERMAN,
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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, John W. Waterman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circiut, which affirmed the judgment of the United States District Court for the District of Nebraska denying habeas corpus relief. A jury had convicted petitioner on five counts of mail fraud for which he was sentenced to ten years, five consecutive two-year terms of imprisonment.

OPINION BELOW

A unanimous panel of the court of appeals, including Chief Judge Lay, reversed the district court's denial of habeas corpus relief. *United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984), reprinted as Appendix A. Upon *en*

banc consideration, without the participation of Chief Judge Lay, the judgment of the district court was affirmed by an equally divided court and without opinion. Appendix B. A timely request for further *en banc* consideration was denied on November 2, 1984, without the participation of Chief Judge Lay, two judges dissenting. Appendix C.

JURISDICTION

The timely petition for a rehearing was denied on November 2, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In March, 1980, Eugene Gamst was indicted as the ringleader of an arson-for-hire scheme with several co-conspirators. In May, he agreed to testify concerning the conspiracy in a standard, universally accepted arrangement to testify fully and truthfully. In June, Gamst testified exhaustively against his co-conspirators concerning three critical fires. Petitioner, known to the indicting grand jury and Gamst, was not charged as a conspirator, unindicted co-conspirator or accomplice, or implicated during the trial.

After this trial, Gamst was sentenced and immediately began a twelve-year term in federal prison. Just as the 120-day jurisdiction limit on F.R.Crim.P. 35 was about to toll, after nearly four months of incarceration, Gamst agreed to cooperate once again. The government agreed to take a position at the Rule 35 hearing that Gamst should receive a two-year reduction in his prison term if further charges against "certain individuals" were brought, based

on his further cooperation.[1] Gamst then implicated petitioner in relatively unimpeachable ways, stating that Waterman contributed cash to the *same three fires* constituting the criminal venture and profited, in cash, from the Gamst scheme.

Both courts below found identical facts; they are simple and undisputed. The substance of the agreement was that if Gamst's cooperation led to further indictments, the government would affirmatively recommend that Gamst's sentence be reduced by two years; if no other individual were indicted, the government would not recommend any reduction in his sentence.

After petitioner's conviction, the government delivered on its promise to Gamst at his Rule 35 hearing.

REASONS FOR GRANTING THE WRIT

I. THE CONTINGENCY AGREEMENT TO OBTAIN THE INFORMANT'S TESTIMONY SO TAINTED THE INTEGRITY OF THE FACT-FINDING PROCESS AS TO DENY PETITIONER A FAIR TRIAL.

There can be no doubt that the contingency agreement invited falsehood, nor that such falsehood was, in fact, produced in this case.[2] Moreover, there can be no policy

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[1]At the original trial, *United States v. Stonys,* Cr. 80-0-32 (D.Neb. 1980), *aff'd sub nom United States v. Lemm,* 680 F.2d 1193 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 739 (1983), Gamst swore he had mentioned all of the persons who profited in this scheme, without naming petitioner. *Id.* at Tr. 1662. This testimony was changed at petitioner's trial. Tr. 48-49. Gamst understood his agreement with the government to be contingent on further charges against other persons. Tr. 302.

[2]See n.1, *supra.*

or systemic reason for the government to make any agreement with a man who stood in Gamst's position. In the federal system, if the grand jury is interested in questioning a convicted conspirator as to the full extent of his or her involvement in the conspiracy, the person is simply subpoenaed to the grand jury, where no fifth amendment interest against self-incrimination remains. It is not uncommon for a convicted conspirator who has not taken the stand in his or her own defense to be so subpoenaed and the government never has to negotiate for testimony so obtained. There is generally no need for the grand jury to direct inquiry to a person such as Gamst because he had already taken the stand for the government under oath to tell the whole truth concerning the conspiracy. If a need arises, the lawful and orderly method of procuring the testimony of a person who has waived the fifth amendment privilege is by subpoena. An immunity order can displace the privilege beyond the waiver, if necessary. No contract is called for; no price must be paid for the truth. Gamst had nothing to trade but falsehood.

Thus, review of this case provides an opportunity to examine the issue of contingency agreements without discussing the plea negotiation process. Gamst did not negotiate a plea. He negotiated and received a reduction in sentence through testimony about accomplished facts.

A significant body of authority supports the proposition in the panel opinion that there is "no place in due process law for positioning the jury to weed out the seeds of untruth *planted by the government.*" 732 F.2d at 1532 (emphasis added). Courts have generally recognized the need for due process to control the government's compilation and presentation of testimony.

As this Court explained in *Manson v. Braithwaite,* 432

U.S. 98, 102-114 (1977), due process and a fair trial can be denied by unduly suggestive identification procedures. No amount of cross-examination can cure the taint. The rationale for suppression is set forth at some length in *Manson*. Although "reliability is the primary factor," two other objectives must be kept in mind: deterrence and maintenance of the integrity of the judicial process. *Id.* All of these goals are met by the suppression of the testimony in this case. The government's own involvement in presenting the temptation to corrupt the truth-seeking function of the trial requires no lesser remedy.

The wisdom of the panel opinion is that it recognizes the appropriateness of the suppression remedy when the government has a hand in producing the unreliable evidence that the jury was allowed to consider. In this posture, the remedy is most ordinarily invoked by trial courts when the government declines to produce Jencks material. See 18 U.S.C. § 3500(d).[3] The functional remedy in a case such as *Napue v. Illinois,* 360 U.S. 264 (1959), is that upon retrial, the perjured testimony may not be used. *See Alcorta v. Texas,* 355 U.S. 28 (1957). The remedy is also consistent with other cases where irretrievable falsehood corrupted the truth-seeking function of the criminal process.[4]

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[3]*See e.g., United States v. Well,* 572 F.2d 1383 (9th Cir. 1978).

[4]See *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956) (remanding with directions to allow additional evidence before the Subversive Activities Control Board; appellants alleged new evidence showing that witnesses relied upon by the Board had perjured themselves in similar proceedings. "The untainted administration of justice is certainly one of the most cherished aspects of our institutions." *Id.* at 124); *Mesarosh v. United States,* 352 U.S. 1 (1956) (Smith Act conviction reversed and remanded for a new trial because of new evidence that a government witness lied; the court stated that federal courts have a responsibility "to see that the waters of justice are not polluted.").

Guidance can also be found in the authorities suppressing the in-court identification of defendants based on the irretrievable suggestivity of an out-of-court showup, lineup or similar confrontation. *Foster v. California,* 394 U.S. 440 (1969). *See also, United States v. Valdez,* 722 F.2d 1196, 1203 (5th Cir. 1984) (when a hypnotized subject who identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic identification is unreliable and therefore inadmissible).

Experienced prosecutors, defense attorneys and judges know that most informants motivated by fear of incarceration lack the moral restraint of reasonable men. Few prisoners under a final judgment who have informed before would not entertain an offer to reduce their terms by two years in exchange for testimony. As penalties by way of incarceration and forfeiture rise, the threat to the criminal justice system posed by contingency agreements for testimony increases. Gamst is not an informant who reported fraud when it was discovered. He confessed when he was charged with managing an illegal scheme; he was then incarcerated. Thereafter, to reduce his sentence, he expanded his scheme in relatively uncorroborated ways to include petitioner. A corrupt, yet ostensibly honest businessman such as Gamst is likely to draw broadly the outlines of the conspiracy he managed when his own sentence is so narrowed. All his business acquaintances, banker, lawyer, broker or supplier, are thereby exposed to false charges. The panel below correctly found that the criminal justice system cannot afford this risk of such prevarication and it nullified all agreements which invite or trust such a determination to a felon, much less to a professional insurance swindler such as Gamst.

The panel opinion is scholarly, convincing and widely read as the defense bar invokes what is now called the

"Waterman Doctrine" at every critical stage of the criminal process in the trial courts. The uncertain legacy of the opinion and the importance of the issue to the maintenance of the integrity of the criminal justice system plead for guidance by this Court.[5]

II. THE COURT OF APPEALS HAS ISSUED AN ORDER WHICH IS THE OPPOSITE OF THE MAJORITY VIEW OF THE COURT.

This cause came before a circuit panel consisting of Chief Judge Lay, Judge Heaney and Judge Bowman on appeal of a denial of a petition for a writ of habeas corpus. In a unanimous opinion authored by Judge Heaney and rendered on May 2, 1984, the panel reversed the district court, *United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984). App. A. The panel published a well-reasoned and now well-regarded opinion in support of its order directing habeas corpus relief. A request for *en banc* consideration was granted. On the date of oral argument, only eight judges were present; Chief Judge Lay was absent.

The *en banc* court affirmed the denial of habeas cor-

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[5]Compare, *People v. Kelly,* No. 3-84-0121 (3rd Dist. Ill. Jan. 8, 1985) (agreement found noncontingent); *United States v. Kenny,* Crim. No. 84-00007-01-P (D.Me. Dec. 5, 1984) (noting that the *Waterman* Doctrine is "ensnared in a welter of procedural confusion" because of the *en banc* order at issue here, acknowledging the persuasiveness of the panel opinion; agreement found noncontingent); *United States v. Spradley,* No. 84-3220 (11th Cir. Oct. 30, 1984) (agreement found noncontingent); and *United States v. Eschweiler,* 745 F.2d 435, 439 (7th Cir. 1984) (*Waterman* panel opinion cited; agreement found noncontingent) with *United States v. Baresh,* 595 F.Supp. 1132 (S.D.Tex. 1984) (*Waterman* panel opinion relied upon; mistrial granted); and *United States v. Dailey,* 589 F.Supp. 561 (D.Mass. 1984) (suppressing testimony of three prosecution witnesses in reliance upon *Waterman* panel opinion), *appeal pending,* No. 84-1578 (1st Cir.).

pus relief by an equally divided court, without opinion. Chief Judge Lay did not participate in this vote nor was his panel vote on the merits taken into consideration. App. B. A timely petition for rehearing by all nine judges[6] was denied, two judges in dissent without opinion. App. C.

Cases and controversies are to be "heard" and "determined" by the federal appellate courts. 28 U.S.C. § 46. That is, cases should be resolved. An appellate court has a responsibility to strive for a majority, even if it means rehearing a case. *Briscoe v. Bank of Kentucky,* 33 U.S. 118 (1834) (Marshall, C.J.).

Beyond the rendition of justice, a court must appear to do so. An objective evaluation of the posture of decision here does not meet this standard. A majority of the Eighth Circuit bench has voted in favor of habeas corpus relief yet it has been denied petitioner without opinion. This is apparently unprecedented. We respectfully submit that this case should be heard for this reason alone.

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[6]See *United States v. American Foreign S.S. Corp.*, 363 U.S. 685, 687 (1960) (noting such a petition); and *e.g., Alexander v. United States,* 173 F.2d 867, 181 F.2d 480 (9th Cir. 1950).

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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January 31, 1985

APPENDIX A

UNITED STATES of America, Appellee,

v.

John Walter WATERMAN, a/k/a Jack Waterman, Appellant.

No. 83-2159.

United States Court of Appeals,
Eighth Circuit.

Submitted Feb. 13, 1984.

Decided May 2, 1984.

Michael Tigar, Washington, D.C., argued, for appellant.

Robert F. Kokrda, Omaha, Neb., argued, for appellee.

Before LAY, Chief Judge, and HEANEY and BOWMAN, Circuit Judges.

HEANEY, Circuit Judge.

John W. (Jack) Waterman appeals from the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (1982). Waterman claims that an agreement between the government and the star prosecution witness against him irreparably tainted that witness' testimony, depriving Waterman of the fundamental fairness protected by the United States Constitution. We hold that the government's agreement with its

key witness hampered the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause of the fifth amendment. Because the testimony given pursuant to this agreement was critical to support Waterman's conviction, we reverse the district court's denial of his section 2255 motion.

We are not unfamiliar with Waterman or his case. A jury convicted him on five counts of mail fraud arising out of an arson-for-profit scheme conducted in Omaha, Nebraska, from 1976 through 1978. *See* 18 U.S.C. §§ 1341-1342 (1982). On June 17, 1982, the district court sentenced Waterman to two years imprisonment on each count, the terms to run consecutively, for a total sentence of ten years. Waterman appealed to this Court, alleging that the district court improperly refused to order the production of FBI notes concerning the pretrial interviews of a prosecution witness and challenging the sufficiency of the evidence supporting each count against him. *United States v. Waterman,* 704 F.2d 1014, 1016 (8th Cir. 1983). We found no merit to Waterman's allegation concerning the FBI notes, and held the evidence at trial sufficient to support four of the five counts on which Waterman was convicted. We reversed the conviction on the fifth count for insufficient evidence because it rested entirely upon the uncorroborated hearsay testimony of the ringleader of the fraudulent scheme, Eugene Gamst. *Id.* at 1017-1018.

Waterman then petitioned this Court for a panel rehearing or a rehearing en banc. He based this petition upon an allegedly improper agreement between the government and Gamst at the time of Waterman's trial. Gamst had previously pled guilty to participation in arson and fraud activities in Omaha and elsewhere. He received a twelve-

year sentence for his crimes pursuant to an agreement with the government to testify against others in the scheme. *Id.* at 1016. We upheld the convictions of several of Gamst's accomplices on direct appeal in *United States v. Lemm,* 680 F.2d 1193 (8th Cir.1982), *cert. denied,* 459 U.S. 1110, 103 S.Ct. 739, 74 L.Ed.2d 960 (1983). After the trial in *Lemm,* Gamst sought a reduction of his twelve-year sentence under Fed.R.Crim.P. 35. On petition for rehearing or rehearing en banc in the Waterman appeal, Waterman alleged that the government agreed to recommend a two-year reduction in Gamst's sentence if his continued cooperation led to further indictments. Waterman asserted that this "bounty" or "contingency" agreement tainted Gamst's testimony against him.

We declined to address this matter on Waterman's petition for rehearing or rehearing en banc with the following observations:

> Waterman's petition raises a serious matter. However, the alleged impropriety of the Government's agreement with Gamst was never raised on direct appeal as a matter of error by brief or directly in oral argument. In addition, it would appear that a factual record may need to be developed on this issue. Accordingly, we deny the petition for rehearing, but without prejudice to Waterman's presenting his claim to the district court by an appropriate petition under 28 U.S.C. § 2255 or under Rule 35 of the Federal Rules of Criminal Procedure.

United States v. Waterman, 716 F.2d 482, 482 (8th Cir.1983) (order on petition for rehearing.)

Waterman filed the present section 2255 motion on July 27, 1983. The district court held a hearing on the motion

on August 11, 1983. Waterman's counsel presented exhibits, stipulations of counsel, and argument regarding the allegedly improper agreement with Gamst.

The record developed below contains a December 16, 1980, letter from Gamst's attorney to an assistant United States attorney in Omaha setting forth the terms of a purported oral agreement for Gamst's further cooperation with the government.[1] The government attorney replied by letter dated December 18, 1980, stating that the gov-

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[1]The substance of the December 16, 1980, letter from Gamst's counsel was the following:

> You indicated to me that if Mr. Gamst cooperates in the Grand Jury investigation of certain individuals and if charges are brought against those persons you would, in the context of a motion to reduce sentence:
>
> 1. Affirmatively recommend to the Court that Mr. Gamst's sentence be reduced by a maximum of two years. It is my understanding that this two year period is not a limitation on the extent of any reduction for which we may move nor is it intended to be a limitation on the Court's authority to grant a further reduction if it deems such action appropriate.
>
> 2. You would inform the parole commission and any other appropriate persons of the fact and extent of Mr. Gamst's cooperation with the government.
>
> In the event Mr. Gamst cooperates, and no charges are brought, you indicated that:
>
> 1. You would acknowledge and inform the Court of Mr. Gamst's cooperation with the government. This would be done in the context of our Rule 35 motion, but would not involve any actual recommendation of a reduced sentence.
>
> 2. As I understand it, your willingness to inform the parole commission and, if appropriate, others of Mr. Gamst's cooperation is not contingent upon charges being brought.
>
> Therefore, I assume from your conversation that this action would be taken by you in return for cooperation irrespective of actual charges.

ernment "would be interested in Mr. Gamst's further cooperation by way of truthful testimony in any further Grand Jury investigations, indictments, and trials, if necessary." He agreed that "the government would be willing to acquiesce in a recommendation of two years reduction of sentence in the motion to reconsider sentence now pending."[2]

The district court considered these letters and a stipulation of counsel regarding their meaning, and received other evidence reflecting the government's actions after Gamst's testimony against Waterman. The court found:

> After Gamst's conviction and incarceration, he agreed to collaborate with the government in order to provide a basis for charging additional participants in the arson scheme. *The substance of the agreement was that, if Gamst's coopera-*

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[2]The key paragraph in the government's December 18, 1980, response read in full:

> As we have discussed, it now appears that there are further matters that warrant investigation in this arson enterprise. These matters may lead to criminal charges being brought against other individuals not known at the time the original charges were brought. Naturally, we would be interested in Mr. Gamst's further cooperation by way of truthful testimony in any further Grand Jury investigations, indictments, and trials, if necessary. Therefore, the government would be willing to acquiesce in a recommendation of two years reduction of sentence in the motion to reconsider sentence now pending before Judge Denney. We would also be willing to acknowledge his cooperation to other agencies and the Bureau of Prisons. Please note that the testimony of Mr. Gamst concerning his knowledge of these matters could well extend past the grand jury proceedings to any trials or hearings if necessary. Again, all that we would request would be his truthful testimony concerning his recollections of these matters.

> *tion in the form of truthful testimony led to further indictments, the government would (1) affirmatively recommend that Gamst's sentence be reduced by two years,* and (2) inform appropriate federal agencies of the fact and extent of Gamst's cooperation. *If, however, Gamst's testimony did not lead to the indictment of other individuals, then the government* would acknowledge and inform the Court of Gamst's cooperation, but *would not specifically recommend any reduction in his sentence.* The record reveals that as a result of Gamst's testimony at the grand jury investigation and trial of Waterman, the government in fact made an affirmative recommendation that Gamst's sentence of imprisonment be reduced by two years.

United States v. Waterman, CR 81-0-47 (D.Ne. August 17, 1983) (memorandum opinion and order) (emphasis added).

Waterman questioned the constitutionality of this agreement under the sixth amendment provisions ensuring the fairness of criminal proceedings and the due process clause of the fifth amendment. He also claimed that the agreement violated the spirit, if not the letter, of 18 U.S.C. § 201 (1982), which proscribes bribery of witnesses; that it encouraged perjury to an extent which could not be rectified by cross-examination; and that it undermined the integrity of our judicial system.

The district court disagreed with Waterman's assertions that the agreement with Gamst violated the Constitution or any other provision of law. The court noted that agreements not to prosecute or to recommend leniency in punishment in exchange for cooperation with the government have long been approved. It stressed that the

agreement with Gamst was admitted into evidence at the Waterman trial and subject to thorough cross-examination by Waterman's attorneys, that the agreement only supplemented Gamst's earlier commitment to testify truthfully as part of his plea bargain, and that substantial evidence other than Gamst's testimony supported Waterman's conviction. The court concluded that the governmen'ts conduct in this context did not violate the fundamental fairness mandated by the due process clause. *United States v. Waterman, supra,* CR 81-0-47 at 3-4. Waterman's appeal is in essence a disagreement with the legal conclusion drawn from the facts by the district court.

The parties have been unable to cite us any cases directly on point. We are not faced with the situation of a paid informant who might be more likely to entrap a defendant because of the contingent nature of her or his compensation. *See United States v. Civella,* 666 F.2d 1122, 1129 (8th Cir.1981). Nor do the facts before us resemble government participation in illegal activity with a defendant prior to trial through undercover agents or paid informants which, although not technically entrapment, is so outrageous as to deny the defendant due process of law. *See United States v. McCaghren,* 66 F.2d 1227, 1230-1231 & nn. 5-7 (8th Cir.1981). Likewise, we are not asked to find a due process violation based upon the government's failure to disclosure an immunity agreement with a prosecution witness. *See Giglio v. United States,* 405 U.S. 150, 153-155, 92 S.Ct. 763, 765-766, 31 L.Ed.2d 104 (1972); *United States v. Bigeleisen,* 625 F.2d 203, 205-210 (8th Cir.1980). Instead, we must decide whether an agreement to procure testimony about accomplished facts, which places a premium on testimony adverse to a defendant, creates a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause.

We recognized that an agreement granting government favors to a prosecution witness in return for truthful testimony about others is not *per se* illegal in *United States v. Librach,* 536 F.2d 1228, 1229-1230 (8th Cir.), *cert. denied,* 429 U.S. 939, 97 S.Ct. 354, 50 L.Ed.2d 308 (1976). In *Librach,* we went on to discuss the court's supervisory powers to require fair conduct at trial by the government, however, and held that the immunity agreement entered with a witness named Fowler in that case did not constitute unfair prosecutorial conduct. We stated,

> The agreement was made and binding upon the government before Fowler testified; it was not contingent upon the government's satisfaction with the content of the testimony. Fowler could testify truthfully and fully pursuant to the agreement without fear of reprisal. His testimony related to known facts; the agreement did not require the witness to seek out incriminating evidence against the appellant. * * * Further, the jury was fully apprised of the conditions under which Fowler testified.

Id. at 1230 (citations omitted).

These observations regarding the fair conduct of trials under a court's supervisory powers are equally applicable to the fundamental fairness mandated by the due process clause. Thus, we must now answer the question left open in *Librach* as to the fairness of agreements to reward those who testify for the government *contingent upon* the content and results of their testimony.

We agree with Waterman that the government cannot consistent with due process offer favorable treatment to a prosecution witness contingent upon the success of the prosecution. Such an agreement is nothing more than an

invitation to perjury having no place in our constitutional system of justice. The government attempts to avoid this common sense approach to due process in the instant case by distinguishing the agreement made with Gamst and emphasizing the jury's ability to decide upon the credibility of witnesses. It also declares that Waterman was not prejudiced by the agreement with Gamst. We cannot agree as a matter of law or fact.

Although the agreement in this case was contingent upon the government bringing charges against others, rather than upon successful convictions, we believe that the circumstances surrounding the agreement cast a shadow over both Gamst's pretrial cooperation with the government and his testimony at Waterman's trial. As the district court found, the contingency agreement to recommend a two-year reduction in Gamst's sentence supplemented his earlier agreement to cooperate in the government's continuing investigations and prosecutions involving the arson-for-profit scheme. Should Gamst have decided to stretch or disregard the truth to obtain Waterman's indictment, and thus a favorable recommendation pursuant to the contingency agreement on the motion to reduce his prior twelve-year sentence, he would be foolish to change his story during the Waterman trial at which he also was bound to testify. Moreover, the government's December 18, 1980, letter acknowledging the contingency agreement specifically referred to Gamst's "cooperation by way of truthful testimony in any further * * * trials, if necessary." Therefore, Waterman's claim that the contingency agreement tainted Gamst's testimony at trial is not a bald attempt to boostrap improprieties before the grand jury into constitutional trial error. *Cf. United States v. Calandra,* 414 U.S. 338, 345, 351, 94 S.Ct. 613,

618, 621, 38 L.Ed.2d 561 (1974) (indictment valid on its face cannot be challenged because the grand jury acted on inadequate, incompetent, or even unconstitutionally obtained evidence).

In addition, we cannot accept the argument that the jury, which was given notice of the contingency agreement, could legitimate this contingency agreement by deciding for itself whether Gamst was testifying truthfully. This is not the case where a defendant who thoroughly attacks a witness' credibility on cross-examination might therefore be unable to show prejudice in the government's failure to disclose a non-contingency immunity agreement with that witness. *See United States v. Smith,* 538 F.2d 1332, 1334 (8th Cir. 1976) (per curiam). This case involves not the undisclosed possibility of bias, but the disclosed encouragement and reward of bias. Waterman and the jury were made aware of the letters between Gamst's attorney and the government.[3] This disclosure was insufficient, however, to overcome the due process problems inherent in the contingency agreement itself. In the first place, the government's December 18, 1980, letter only vaguely adopted the contingent nature of the agreement, so the jury might have assumed that the government was committed to help Gamst in the same manner regardless of the fruitfulness of his cooperation. More fundamentally, however, we see no place in due process law for position-

[3]Perhaps the better course in this case would have been for Waterman to raise his due process objection to Gamst's testimony at his trial on the merits. Because the government has not objected to Waterman's failure to raise this issue before the trial court, we hold that Waterman should not be denied postconviction relief for any procedural defects in his motion. *See Manson v. Brathwaite,* 432 U.S. 98, 102 n. 7, 98 S.Ct. 2243, 2247, n. 7, 53 L.Ed.2d 140 (1977).

ing the jury to weed out the seeds of untruth planted by the government. Certainly Gamst might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others.

Finally, given our decision that the contingency agreement with Gamst violated the requirements of due process in Waterman's trial, we cannot accept the government's assertion that Waterman was not prejudiced by the violation. Although we noted on direct appeal that evidence independent of Gamst's testimony supported Waterman's convictions on the four counts which we affirmed, *United States v. Waterman, supra,* 704 F.2d at 1017, the independent evidence was not so overhwelming that the erroneous admission of Gamst's testimony could for this reason be labeled harmless.

The government alternatively argues that a lack of prejudice in this case may be established by the similarity between Gamst's testimony regarding Waterman in proceedings prior to the December, 1980, contingency agreement and his testimony at the Waterman trial after that agreement. We have serious reservations about this approach to measuring the prejudicial effect of the illegal agreement because it assumes that Gamst's prior testimony is an accurate benchmark for the truth. To the contrary, the contingency agreement might have simply been an added incentive for Gamst to again risk perjury conviction and continue in earlier stated lies.

Nonetheless, we have carefully reviewed Gamst's testimony at the trial of other participants in the fraudulent scheme during June and July of 1980, *United States v.*

Stonys, CR 80-0-32 (D.Neb.1980), *aff'd sub nom. United States v. Lemm, supra,* and compared that to the Gamst testimony at Waterman's trial. Gamst referred to Waterman in the earlier trial and stated that Waterman, as a real estate agent, obtained houses for Gamst and others with the knowledge that the houses would be burned for insurance profit. After the contingency agreement had been entered into, however, at the Waterman trial Gamst detailed times, places, conversations, and arrangements that gave factual context to Waterman's participation in the scheme. Significantly, at the Waterman trial Gamst recounted instances in which Waterman provided the front money to purchase several houses for arson and split the profits of the insurance proceeds with Gamst. None of the statements made by Gamst during prior proceedings intimated such a degree of involvement by Waterman. Thus, we cannot decide that Gamst's detailed testimony at Waterman's trial, which bolstered his conclusive inculpatory statements about Waterman before, was not influenced by the contingency agreement entered into by Gamst in the interim.

The government's last attempt to show lack of prejudice to Waterman is its claim that Gamst did not even know of the contingent nature of his agreement with the government. The district court made no finding of fact in this regard, but its memorandum opinion and order must be read to assume that Gamst had full knowledge of the contingency agreement. Indeed, Gamst testified at the Waterman trial that he knew the government had offered to make a recommendation for a two-year reduction in his sentence, which was consistent with the contingency agreement. Thus, we think as a matter of law that this record can only be read to establish that Gamst knew of the con-

tingency agreement both before and during Waterman's trial.

In sum, we are convinced that due process cannot be interpreted to allow the government to reward its witnesses based upon the results of their testimony., There simply is no reason to offer a witness favorable treatment for anything other than truthful cooperation in the government's quest for justice. For the above reasons, we reverse the district court's denial of Waterman's section 2255 motion and remand with directions to the district court to vacate Waterman's sentence and order his release from custody. The government of course is free to retry Waterman.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-2159

United States of America, Appellee, v. John Walter Waterman, a/k/a Jack Waterman, Appellant.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: September 13, 1984

Filed: September 20, 1984

Before HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, en banc.

ORDER

This case has been considered by the Court en banc.* Judges Heaney, Bright, Arnold, and Bowman would reverse the district court and adhere to the panel opinion. Judges Ross, McMillian, John R. Gibson, and Fagg would affirm the district court. Therefore, the judgment of the

district court is affirmed by an equally divided Court.

A true copy.
Atteset:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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*Chief Judge Donald P. Lay did not participate in the vote on this case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2159-NE. September Term, 1984

UNITED STATES OF AMERICA,	*	
	*	
Appellee,	*	
	*	Appeal from the
VS.	*	United States
	*	District Court
JOHN WALTER WATERMAN,	*	for the District
a/k/a JACK WATERMAN	*	of Nebraska.
	*	
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judges Gerald W. Heaney and Myron H. Bright would have granted the petition.

Judge Donald P. Lay did not participate.

Petition for rehearing by the panel is also denied.

November 2, 1984

Supreme Court, U.S.
FILED
FEB 12 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1235 (2)

IN THE
Supreme Court of the United States
October Term, 1984

JOHN W. WATERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

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January 1985

THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN WALTER WATERMAN,
Defendant.

CR. 81-0-47

FILED
District of Nebraska
At _____M
AUG 17 1983
William L. Olson
Clerk
By _____ Deputy

John W. Waterman was convicted by a jury on five counts of an indictment charging him with devising and intending to devise a scheme and artifice to defraud by use of the mails, in violation of 18 U.S.C. §§ 1341 and 1342. The mail fraud charges arose out of Waterman's participation in, and connection with, an arson-for-profit scheme in Omaha, Nebraska. On June 17, 1982, Waterman was sentenced to a two-year term of imprisonment on each count. The Court ordered Waterman to serve these five sentences of imprisonment consecutively. On appeal, the Eighth Circuit Court of Appeals affirmed Waterman's convictions on four counts and reversed the fifth count for lack of substantial evidence to support that conviction. Waterman's petition for rehearing with a further request for hearing *en banc* was thereafter denied by the Court of Appeals.

On July 27, 1983, Waterman filed a properly-pleaded motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. On August 11, 1983, a hearing, at which both Waterman and the United States were represented by

counsel, was held with respect to Waterman's § 2255 motion. After careful review and consideration of the pleadings, exhibits, briefs, and arguments and stipulations of counsel, the Court concludes that Waterman's motion for postconviction relief should be denied.

Waterman now challenges the propriety, legality and constitutionality of an agreement entered into by and between the United States and Eugene Gamst, the leader of the arson ring at issue and the government's chief witness against Waterman. After Gamst's conviction and incarceration, he agreed to collaborate with the government in order to provide a basis for charging additional participants in the arson scheme. The substance of the agreement was that, if Gamst's cooperation in the form of truthful testimony led to further indictments, then the government would (1) affirmatively recommend that Gamst's sentence be reduced by two years, and (2) inform appropriate federal agencies of the fact and extent of Gamst's cooperation. If, however, Gamst's testimony did not lead to the indictment of other individuals, then the government would acknowledge and inform the Court of other individuals, then the government would acknowledge and inform the Court of Gamst's cooperation, but would not specifically recommend any reduction in his sentence. The record reveals that as a result of Gamst's testimony at the grand jury investigation and trial of Waterman, the government in fact made an affirmative recommendation that Gamst's sentence of imprisonment be reduced by two years.

In support of his § 2255 motion, Waterman argues that the agreement between the United States and Gamst in particular, as well as similar bargains in general: (1) deprived Waterman of his Sixth Amendment right to a

fundamentally fair trial; (2) deprived Waterman of due process of law and equal protection under law, in violation of the Fifth Amendment to the Constitution; (3) violated the spirit if not the letter of 18 U.S.C. § 201 (criminal statute proscribing bribery of public officials and witnesses); (4) encouraged the giving of false and perjured testimony against which a defendant's right to cross-examine witnesses is an insufficient safeguard; and (5) constituted bounty agreements which trade favors for indictments and undermine the integrity of our judicial system. The Court disagrees.

This Court has been cited to no decisional authority which struck down or invalidated on constitutional grounds an agreement such as that entered into by the government and witness Gamst. It may be noted that an agreement not to prosecute, or to recommend leniency in the punishment of, an accomplice "who is cooperating in the conviction of others is recognized as a proper exercise of authority." *United States v. Librach,* 536 F.2d 1228, 1230 (8th Cir.), *cert. denied,* 429 U.S. 939 (1976); *see also United States v. Vida,* 370 F.2d 759, 767 (6th Cir. 1966) (use of the testimony of a convicted but unsentenced accomplice does not deprive one who stands trial of due process or fair treatment).

Waterman's protestation to the contrary notwithstanding, the credibility of Gamst and the sufficiency of evidence against Waterman in the absence of Gamst's testimony must be considered in disposing of the instant § 2255 motion. In that connection, the Court notes as follows:

1) The agreement made to secure the truthful testimony of Gamst in the criminal proceeding against Waterman was read in open court and admitted in evidence. "[T]he

jury was fully apprised of the conditions under which [Gamst] testified." *Librach, supra.*

2) During the trial of Waterman, Gamst was subjected to thorough and exhaustive cross-examination about the nature of his arrangement with the government.

3) The possibility of a recommendation of reduction of Gamst's sentence was not discussed until after Gamst had come forward with information about other participants in the arson scheme, and had indicated his willingness to testify. *See United States v. James,* 494 F.2d 1007, 1013 n.3 (D.C.Cir.), *cert. denied,* 419 U.S. 1020 (1974).

4) Even if Gamst's testimony was totally discounted, there was substantial evidence, both testimonial and documentary, from which the jury could have reached the same verdicts. *See Hallman v. United States,* 490 F.2d 1088, 1090 (8th Cir. 1973). At trial, several witnesses, including Peggy O'Brien, Phillip Dahl and Delores Skelton, provided damaging testimony against Waterman. As stated by the Court of Appeals, ". . . the Government presented additional witnesses whose testimony corroborated that of Gamst and independently confirmed Waterman's role in arranging the arson fires charged in counts I through IV." *United States v. Waterman,* 704 F.2d 1014, 1017 (8th Cir. 1983).

Finally, Waterman has wholly failed to show "that the challenged government conduct violates 'that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment.'" *United States v. Brown,* 635 F.2d 1207, 1212 (6th Cir. 1980), *quoting United States v. Russell,* 411 U.S. 423, 432 (1973).

For each and all of the foregoing reasons,

IT IS HERBY ORDERED that Waterman's motion (Filing No. 85) for postconviction relief under 28 U.S.C. § 2255 should be and the same is hereby denied.

IT IS FURTHER ORDERED that the stay of the order of commitment (Filing No. 84) heretofore entered is dissolved and defendant shall report to the Office of the United States Marshal, Room 8121, United States Post Office and Courthouse, 215 North 17th Street, Omaha, Nebraska, 68102, on the 24th day of August, 1983, at 9 a.m., to commence serving his sentences on Counts I through IV, previously imposed.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT

I certify this to be a true copy of the original record in my custory.
WILLIAM L. OLSON, CLERK

By /s/

Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS

No. 84-1235

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. WATERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated by the admission of testimony of a convicted accomplice who may have expected a more favorable sentence reduction recommendation if his cooperation resulted in future indictments.

2. Whether petitioner's due process rights were violated because the district court's denial of his motion for post-conviction relief under 28 U.S.C. 2255 was affirmed by an equally divided en banc court.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1235

JOHN W. WATERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals panel (Pet. App. 1a-13a) and the judgment order of the en banc court of appeals (Pet. App. 14a-15a) are reported at 732 F.2d 1527. The memorandum opinion of the district court is unreported. Earlier opinions of the court of appeals on petitioner's direct appeal are reported at 704 F.2d 1014 and 716 F.2d 482.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 14a-15a) was entered on September 20, 1984. A petition for rehearing was denied on November 2, 1984 (Pet. App. 16a). The petition for a writ of certiorari was filed on January 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to consecutive terms of two years' imprisonment on each count. The court of appeals affirmed petitioner's convictions on four of the counts. 704 F.2d 1014 (1983). Petitioner subsequently filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the Section 2255 motion, and, after a panel of the court of appeals had reversed, the en banc court of appeals affirmed the judgment of the district court by an equally-divided vote (Pet. App. 14a-15a).

1. The evidence at trial showed that petitioner, a real estate agent, participated in an arson-for-profit scheme conducted in Omaha, Nebraska, from 1976 through 1978. The scheme was orchestrated by Eugene Gamst, a public insurance adjuster. In May 1980, Gamst entered into a plea agreement with the government and became the principal prosecution witness against his co-conspirators. In exchange for Gamst's cooperation and his guilty plea to racketeering, mail fraud, and Travel Act charges, the government agreed to dismiss the remaining charges against him and to "acknowledge [Gamst's] cooperation by way of truthful testimony" at the time he was sentenced (Gov't C.A. Br., App. A, Exh. 1).[1] Gamst agreed to "testify truthfully and completely in all further proceedings concerning this case" (*ibid.*).

---

[1]"Gov't C.A. Br." refers to the brief filed by the government in the court of appeals in No. 83-2159, the appeal from the denial of petitioner's Section 2255 motion.

Gamst initially testified against several of the participants in the arson-for-profit scheme other than petitioner. See *United States* v. *Lemm*, 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983).[2] During the course of the *Lemm* trial, Gamst testified that petitioner located houses that could be purchased and burned (Gov't C.A. Br. 8, App. A, Exh. 3). Following the completion of the *Lemm* trial, Gamst was sentenced to 12 years' imprisonment.

The government then contacted Gamst's attorney concerning Gamst's further cooperation in follow-up cases. On December 16, 1980, Gamst's counsel sent a letter to the prosecutor setting forth his understanding "that if Mr. Gamst cooperates in the Grand Jury investigation of certain individuals and if charges are brought against those persons," the government would "[a]ffirmatively recommend" that his sentences be reduced by two years (Pet. App. 4a n.1). However, "[i]n the event Mr. Gamst cooperates, and no charges are brought," Gamst's counsel understood that the prosecutor would "inform the Court of Mr. Gamst's cooperation" but would not make "any actual recommendation of a reduced sentence" (*ibid.*). In either event, Gamst's counsel understood that the prosecutor would make Gamst's future cooperation known to the parole commission (*ibid.*). On December 18, 1980, the prosecutor replied, stating only that the government would acquiesce in a recommendation of a two-year reduction in Gamst's sentence based on his "further cooperation by way of truthful testimony" (Pet. App. 5a). The prosecutor concluded by stating, "[a]gain, all that we would request would be [Gamst's] truthful testimony concerning his recollections of these matters" (Gov't C.A. Br., App. A, Exh. 6).

---

[2]Petitioner did not become a suspect until late in the *Lemm* investigation and therefore was not indicted with the *Lemm* defendants.

2. Petitioner subsequently was indicted on five counts of mail fraud in connection with the arson-for-profit scheme. At petitioner's trial, Gamst testified that after the two men met in the spring of 1976, petitioner agreed to locate and finance properties suitable for arson. Gamst testified that petitioner helped him in arranging four fires and that petitioner arranged a fifth fire on his own. On cross-examination, petitioner's counsel impeached Gamst thoroughly with evidence of his agreements with the government (I Tr. 135-142, 150-155, 201-202, 270-275, 286-288, 290-302). Peggy O'Brien, one of Gamst's accomplices, corroborated much of Gamst's testimony concerning petitioner's involvement in the first four fires (see, *e.g.*, II Tr. 427-435, 438, 442-445, 454, 459-465, 474-475). Another witness, Phillip Dahl, testified that petitioner and Gamst twice solicited Dahl to stage a fire (II Tr. 524-527). Yet another witness, Delores Skelton, testified about petitioner's involvement in one arson-for-profit episode (II Tr. 573-574). Petitioner was convicted on all counts.

The court of appeals affirmed petitioner's convictions on four of the counts. 704 F.2d 1014 (1983). The court of appeals rejected petitioner's claims that the district court should have ordered production of certain summaries of FBI notes and that no reasonable person could have believed Gamst's testimony. The court noted that determination of witness credibility is a matter for the jury and that other witnesses had confirmed Gamst's testimony about petitioner's role in the scheme. *Id.* at 1017. The court of appeals reversed petitioner's conviction on the fifth count on the ground that the government had failed to produce evidence that one of the fires resulted from arson.

Petitioner filed a petition for rehearing in which he contended for the first time that the cooperation agreement between Gamst and the government violated due process.

The court of appeals denied the petition without prejudice to presentation of the claim to the district court pursuant to 28 U.S.C. 2255 or Fed. R. Crim. P. 35. 716 F.2d 482 (1983).

3. Petitioner subsequently filed a motion under 28 U.S.C. 2255, alleging that he was entitled to post-conviction relief because Gamst's testimony against him had been secured by means of an unconstitutional "contingent" cooperation agreement with the government. Following a hearing, the district court denied petitioner's motion. The court construed the post-sentencing agreement between Gamst and the government as according more favorable treatment to Gamst if his cooperation led to further indictments (Aug. 17, 1983, Order, at 2). The court concluded, however, that there had been no violation of due process, because (1) the agreement was read to the jury in open court; (2) Gamst was thoroughly cross-examined about the nature of his agreement with the government; and (3) the possibility of a recommendation for reduction of sentence was not discussed until after Gamst had provided information concerning other participants in the arson scheme and had indicated his willingness to testify (*id.* at 3-4). The court further concluded that, even if Gamst's testimony were disregarded, there was sufficient independent evidence to support petitioner's convictions (*id.* at 4).

A panel of the court of appeals reversed (Pet. App. 1a-13a). Although the panel recognized that agreements to provide favorable treatment in exchange for truthful testimony were not per se illegal, it concluded that "the government cannot consistent with due process offer favorable treatment to a prosecution witness contingent upon the success of the prosecution" (*id.* at 8a). The panel rejected the government's contention that it was the jury's role to determine the credibility of witnesses and that the thorough cross-examination of Gamst allowed the jury to weigh

Gamst's testimony in light of his agreement with the government (*id.* at 10a-11a).

The government filed a petition for rehearing with a suggestion for rehearing en banc. On July 3, 1984, a majority of the judges who were eligible to vote granted the government's request for en banc consideration. On September 20, 1984, the en banc court issued an order affirming the judgment of the district court by an equally divided vote (Pet. App. 14a-15a). Chief Judge Lay, a member of the original panel, did not participate in that vote because of illness.

ARGUMENT

The court of appeals' affirmance without opinion of the district court's denial of post-conviction relief lacks precedential value because it was rendered on an equally divided vote of the en banc court; the decision therefore lacks continuing importance. In any event, the unreported opinion of the district court is correct and does not conflict with any decision of this Court or any court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner contends (Pet. 3-7) that the district court was required to exclude Gamst's testimony because the contingent cooperation agreement between Gamst and the government tainted the integrity of the truthfinding process.[3] That contention is flatly inconsistent with well-established principles governing the competency of witnesses. The Due Process Clause does not bar testimony

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[3]Both the district court and the court of appeals panel, apparently relying on the letter from Gamst's counsel to the prosecutor following Gamst's sentencing, concluded that Gamst and the government entered into a cooperation agreement that was contingent on further indictments. See Aug. 17, 1983, Order, at 2; Pet. App. 4a-6a, 9a. We believe, however, that this is plainly an incorrect characterization of the agreement. The prosecutor's reply of December 18, 1980, did not refer to any contingency other than Gamst's provision of truthful testimony. See

pursuant to a contingent cooperation agreement, so long as the substance of the agreement is disclosed to the defendant before trial and defense counsel has a full opportunity to cross-examine the witness about the terms of the agreement. And even if there ever were circumstances in which that was not so, it is clear under the circumstances of this case that the cooperation agreement between Gamst and the government provided no basis for disqualifying Gamst as a witness at petitioner's trial.

At common law testimony by accomplices and other interested persons was routinely disqualified on the ground that "erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." *Washington* v. *Texas*, 388 U.S. 14, 21 (1967) (footnote omitted). That practice eroded over time and has now been firmly rejected in favor of a rule that permits the jury to decide on the credibility and weight of testimony in light of

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id. at 5a. The United States does not ordinarily enter into cooperation agreements that are contingent on indictments or convictions, since such agreements invite damaging cross-examination. Here the government would have had little incentive to execute a contingency agreement, since Gamst's testimony in the *Lemm* trial already supplied probable cause for the indictment of petitioner. See page 3, *supra*.

The petition confirms the point that contingency agreements are not common in the federal system. In three of the five federal cases cited at Pet. 7 n.5, the court found that the cooperation agreement was non-contingent. The agreement in a fourth case, *United States* v. *Baresh*, 595 F. Supp. 1132 (S.D. Tex. 1984), was drafted by state prosecutors. The district court in *United States* v. *Dailey*, 589 F. Supp. 561 (D. Mass. 1984), appeal pending, No. 84-1578 (1st Cir.), found the cooperation agreements in that case to be contingent on successful prosecutions. We believe that conclusion is erroneous. The agreements in *Dailey* referred only to "value" or "benefit" to the government from the witnesses' cooperation. *Id.* at 565-566, 567. As we explain in our court of appeals brief in that case, each of the witnesses testified in a related proceeding that he did not understand his agreement with the government to be contingent on successful prosecutions.

all relevant factors. The modern practice rests on the recognition that

> the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent * * *.

Rosen v. *United States*, 245 U.S. 467, 471 (1918). See also *Washington* v. *Texas*, 388 U.S. at 22. The Federal Rules of Evidence incorporate the modern rule. See Fed. R. Evid. 402 ("[a]ll relevant evidence is admissible," except as otherwise provided); Fed. R. Evid. 601 ("[e]very person is competent to be a witness," except as otherwise provided). See also Advisory Committee note to Fed. R. Evid. 601 (rule represents a "general ground-clearing [that] eliminates all grounds of incompetency not specifically recognized" by other rules, including "connection with the litigation as a party or interested person").

In applying the modern rule, federal courts have routinely concluded that testimony obtained in exchange for a promise of favorable treatment is admissible. Such testimony does not raise due process concerns, despite the fact that the witness has an obvious incentive to lie. This Court has explained that the existence of such an incentive does not render testimony "constitutionally inadmissible," since "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). See also *Lisenba* v. *California*, 314 U.S. 219, 227 (1941); *Benson* v. *United States*, 146 U.S. 325, 334-337 (1892); *United States* v. *Murphy*, 41

U.S. (16 Pet.) 203 (1842) (owner of stolen goods was a competent witness despite his eligibility to receive a portion of the fine upon conviction). The courts of appeals likewise have held that there is no violation of fundamental fairness merely because an accomplice testifies as a government witness in exchange for a promise of favorable treatment. See, *e.g.*, *United States* v. *D'Antignac*, 628 F.2d 428, 435-436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975); *United States* v. *Spivey*, 448 F.2d 390, 391 (4th Cir. 1971), cert. denied, 405 U.S. 927 (1972).

In addition, courts of appeals have held admissible the testimony of informant-witnesses who have received fees contingent on the value of their services. Although such fee arrangements may create an incentive to lie, the courts have recognized that "there are strong public policy justifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes." *United States* v. *Walker*, 720 F.2d 1527, 1540 (11th Cir. 1983), cert. denied, No. 83-6271 (Mar. 19, 1984). Rather than excluding such testimony on a case-by-case basis, the courts have found it preferable to "leave the entire matter to the jury to consider in weighing the credibility of the witness-informant." *United States* v. *Grimes*, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971). See also, *e.g.*, *United States* v. *Valle-Ferrer*, 739 F.2d 545, 546-547 (11th Cir. 1984); *United States* v. *Lane*, 693 F.2d 385, 387-388 (5th Cir. 1982); *United States* v. *Jones*, 575 F.2d 81, 85-86 (6th Cir. 1978); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 & n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978); *United States* v. *Crim*, 340 F.2d 989 (4th Cir. 1965).

There is no basis for treating contingent cooperation agreements differently from agreements involving accomplice testimony or contingent fee arrangements. Any cooperation agreement is likely to have some element of contingency, since prosecutors normally would not agree to refrain from pursuing charges unless they could obtain some assurance that the witness was prepared to provide valuable evidence. If the government agrees to advise the sentencing court or parole authorities of the extent of the witness's cooperation, common sense suggests that such a recommendation will be more valuable if the cooperation has led to an indictment or conviction. While a cooperation agreement that is contingent on indictments or successful prosecutions may sometimes heighten a witness's interest in the outcome of a proceeding, in most cases the witness will have revealed the nature of his evidence before the agreement is reached. As in the case of other types of testimony by interested persons, the possibility that the witness will provide false testimony in order to obtain benefits under a contingent agreement is best addressed by fully revealing the terms of the agreement to the defendant. Once defense counsel has thoroughly explored the terms of the agreement on cross-examination, the jury is in a position to scrutinize the witness's testimony with additional care.

Here the government fully disclosed the nature of its agreements with Gamst, and petitioner's counsel cross-examined Gamst rigorously about those agreements.[4] Moreover, there were substantial indications that Gamst's testimony was reliable. Both Gamst and another witness,

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[4]Both the district court (Aug. 17, 1983, Order, at 3-4) and the court of appeals panel (Pet. App. 10a) recognized that the government disclosed its arrangements with Gamst to petitioner's counsel and that the latter thoroughly explored those arrangements on cross-examination. See also page 4, *supra*.

Peggy O'Brien, clearly implicated petitioner in the arson-for-profit scheme during the *Lemm* investigation and trial, before the agreement at issue here was reached (see Gov't C.A. Br. 8, App. A, Exhs. 2-4).[5] Gamst's testimony at petitioner's trial was corroborated by several independent witnesses (see page 4, *supra*). The cooperation agreement did not specifically target petitioner; in fact, Gamst also implicated another co-conspirator, who subsequently pleaded guilty. Finally, Gamst indicated his willingness to cooperate in future prosecutions some six months before he entered into the post-sentencing cooperation agreement (see page 2, *supra*; I Tr. 303-304). In these circumstances, the trial court was unquestionably correct in leaving the determination of Gamst's credibility to a properly instructed jury.[6]

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[5]Petitioner errs in his assertion (Pet. 2, 3 n.1) that Gamst failed to incriminate petitioner during the *Lemm* proceedings. The court of appeals panel specifically recognized that "Gamst referred to [petitioner] in the earlier trial and stated that [petitioner], as a real estate agent, obtained houses for Gamst and others with the knowledge that the houses would be burned for insurance profit" (Pet. App. 12a).

We take issue with petitioner's claim that "[t]here can be no doubt" that Gamst testified falsely at petitioner's trial (Pet. 3). It is our belief that Gamst testified truthfully, as he was required to do under the cooperation agreement. See page 3, *supra*. As we discuss in the text, Gamst's testimony was corroborated in several important respects.

[6]At petitioner's trial, the court instructed the jury that it should consider the "apparent fairness or bias" of all witnesses (Jury Instruction 25) and that it should "weigh[] * * * with greater care," because of "self-interest or * * * prejudice," the testimony of an informer who provides evidence against a defendant for immunity from punishment or for personal advantage" (Jury Instruction 26). The court also instructed the jury that it could consider a witness's status as a convicted felon (Jury Instruction 28) and that it should "receive[] with caution and weigh[] with great care" the testimony of an accomplice (Jury Instruction 27).

At bottom, petitioner's claim rests on his belief that the government should not be permitted to enter into contingent cooperation agreements with witnesses. But "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6 (footnote omitted). There is no constitutional basis for treating Gamst's testimony differently from that of any other interested witness.[7]

2. Petitioner also contends (Pet. 7-8) that it was improper for the en banc court of appeals to affirm by an equally divided vote when one active judge failed to participate in consideration of the case. It is not uncommon, however, for either this Court or the en banc courts of appeals to affirm judgments in cases involving criminal law issues by an equally divided vote. See, *e.g.*, *Ramirez* v. *Indiana*, No. 84-5059 (Apr. 1, 1985); *Oklahoma* v. *Castleberry*, No. 83-2126 (Apr. 1, 1985); *Fugate* v. *New Mexico*, No. 83-6663 (Mar. 26, 1985); *Green* v. *Zant*, No. 84-5609 (A-503) (Jan. 7, 1985) (denial of a stay of execution); *Koehler* v. *Engle*, No. 83-1 (Mar. 26, 1984); *Biggers* v. *Tennessee*, 390 U.S. 404 (1968); *United States* v. *Thompson*, 728 F.2d 654 (4th Cir. 1984), cert. denied, No. 83-6501 (Oct. 1, 1984); *United States* v. *Geders*, 585 F.2d 1303, 1305-1306 (5th Cir.

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[7]Petitioner's attempted analogy (Pet. 4-6) to unduly suggestive identification testimony is inapposite. Such testimony calls into question the witness's capacity to perceive and recall relevant events. Here there is no question concerning Gamst's capacity to perceive events in connection with the arson-for-profit scheme or to relate those events to the jury. See *United States* v. *Lightly*, 677 F.2d 1027, 1028 (4th Cir. 1982).

We note also our view that petitioner's challenge to the admissibility of Gamst's testimony could not properly be raised on collateral attack. All of the facts concerning the cooperation agreement were known at the time of the trial; thus, petitioner's due process claim could have been raised on direct appeal. See *United States* v. *Frady*, 456 U.S. 152, 165 (1982).

1978), cert. denied, 441 U.S. 922 (1979); *United States* v. *Clavey*, 578 F.2d 1219 (7th Cir.), cert. denied, 439 U.S. 954 (1978).

The fact that an active judge did not participate in the en banc resolution of this case does not call into question the disposition of the case. Compare, *e.g.*, *Ramirez* v. *Indiana, supra; Oklahoma* v. *Castleberry, supra; Fugate* v. *New Mexico, supra; Green* v. *Zant, supra; Koehler* v. *Engle, supra*. A majority of the en banc court voted to rehear the case en banc. While the judgment of the en banc court lacks precedential value because of the equally divided vote, it nevertheless was a conclusive adjudication as between the parties. See *Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910); *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 545 n.3 (2d Cir.), cert. denied, 379 U.S. 822 (1964). Such a disposition presents no basis for review by this Court.[8]

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[8]Petitioner cites this Court's decision in *Briscoe* v. *Commonwealth Bank of Kentucky*, 33 U.S. (8 Pet.) 118 (1834), for the proposition that an appellate court has an obligation to reach a majority resolution of a case. However, *Briscoe* stated only that it was this Court's practice not to decide constitutional questions by less than a majority vote. *Id.* at 122. The court of appeals did not issue an opinion on a constitutional matter, but merely affirmed by means of a judgment order that lacks precedential value in future cases. Contrary to petitioner's contention, there is no requirement that courts of appeals entertain successive rehearing petitions merely because additional judges become available following the original en banc decision. See, *e.g.*, *United States* v. *Penn*, 647 F.2d 876, 889-890 (9th Cir. 1980). A court of appeals has broad discretion to determine how it will exercise its power with respect to petitions for rehearing en banc. See *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688 (1960); *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 250, 259 (1953). Here petitioner specifically requested that the en banc court reconsider his case with Chief Judge Lay participating, but the court denied that request (Pet. App. 16a), as it had discretion to do.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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